APPEAL NO. 93242

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on February 23, 1993, in (city) Texas, before hearing officer Barbara G. Graham. The hearing officer determined that the respondent, hereinafter claimant, suffered a cervical sprain in the course and scope of her employment, but found that she did not strike her head as part of the accident. The appellant, hereinafter carrier, contends that the hearing officer's decision is against the great weight and preponderance of the evidence. The claimant basically responds that the hearing officer's decision is supported by sufficient evidence; she does not appeal the finding with regard to a head injury.

DECISION

We affirm the hearing officer's decision.

The claimant testified that she had been hired as a stock person for (employer) about one week prior to (date of injury), although she said she had previously worked for that employer for two years. Her job as a stocker required her to work a 10-hour shift which began at 10:00 p.m. In the early morning hours of (date of injury)nd she said that while carrying a large box containing four 10-gallon plastic water cans, she tripped over a wooden pallet and fell to the floor, dropping the box. She said she fell onto her left side and that she hit the side of her head against the floor. When she got up, she had pain in her leg and head but was also embarrassed because she had fallen. She looked around and saw that no one had observed her fall. She testified that about nine or 10 people were working in the store that night, and that the area was noisy because of a radio and large commercial sized fans (the air conditioning was not turned on at night).

The claimant was cross-examined concerning a signed statement she had given on September 26, 1991, to the effect that the accident occurred "after approximately 2:30 a.m." At the hearing she estimated that her first break was at 2:00 a.m. and that the incident occurred sometime after the second and last break and the time she left, around 7:00 a.m. She said she was not wearing a watch and had to ask someone the time because she had an early morning dentist appointment in (city).

The claimant said that around 7:00 a.m. she went to her supervisor, (Ms. B), and asked to leave early because of the dentist appointment. She acknowledged that she did not tell Ms. B about an injury because she said her pain was not as severe as it later became. However, she went home, cancelled her dentist appointment, and went to bed. She said she woke up around 11:00 p.m. in pain. She telephoned (Mr. MG), employer's assistant manager, and told him she had been hurt on the job and needed to see a doctor. She said he spoke rudely to her and told her, "[d]on't come back to work." He also told her to call Mary, another employee, whom claimant was unable to reach until the following Monday, August 5th. Claimant said Mary told her (Mr. GG), the store manager, would call her back. However, when he had not called by 2:00 p.m. she said she and her mother went to

employer's store, where she spoke with Mr. GG and wrote out a written statement regarding her injury. She said Mr. GG was upset, told her she wasn't injured, and said this was the first injury they had had that year. At the same time, she said he told her she could go to a doctor and workers' compensation would cover it.

The claimant said she first saw M.D. (Dr. T), a family practitioner, on August 7th, and treated with him until carrier refused further payment. Dr. T's records indicate that he saw claimant on seven occasions between August 7th and September 6th; that the claimant reported that she tripped and fell while carrying a box at work; that her symptoms included leg, neck and back pain, headaches, dizziness and blackouts; and that he diagnosed femoral trochanteric bursitis and neck and back sprain which he found were job related. Pursuant to a Commission medical examination order, the claimant was also seen by an orthopedic surgeon, M.D. (Dr. H). Dr. H examined claimant and on December 11, 1992 wrote that he did not have any objective data to correlate with the claimant's subjective complaints of pain. He said he did not find any significant organic disease, and felt that the claimant had "a large component of emotional overlay, which tends to exaggerate her symptoms."

Claimant's version of events was disputed by several witnesses for the carrier. Mr. MG, employer's assistant manager at the time of claimant's injury, denied that claimant called him at 11:00 p.m. on (date of injury)nd, and said that August 5th was the first time he was aware claimant was claiming to be injured. On cross-examination he stated that he could not remember whether he was working on the night of (date of injury)nd. He also denied that he told claimant not to come back to work. Mr. GG, the store manager, said he spoke with claimant on August 5th; he denied that he told her she had not hurt herself, but said he told her they had not had an injury in night receiving in more than a year. Mr. GG said he tried unsuccessfully to call claimant on eight occasions, leaving messages on her answering machine. Made part of the record was an August 12th letter from Mr. GG, in which he asked for a doctor's statement regarding her condition and said claimant would be considered to have abandoned her job if she did not contact him by (date of injury)2nd. Although the letter said that "over the past few days we have played phone tag," Mr. GG said he had gotten no calls or messages from claimant.

Ms. B, claimant's supervisor, testified that when she let claimant out of the store on the morning of (date of injury)nd, she said nothing about an injury, did not appear to be in pain, and walked rapidly out of the store. Ms. B said she did not hear a noise when claimant allegedly dropped the box of cans, and said she had heard things drop many times before because sounds in the store were amplified at night when the doors were closed. She said she knew of a PA system radio, but said that employees were not supposed to play display radios. She said the only fans were in the receiving area, which was behind a wall. She estimated that there were 26 people working in the store that night, six of whom were in receiving. She said that any empty pallets would have been picked up in the morning, but

she said she did not pick one up.

Numerous written and signed statements, some notarized, from claimant's coworkers were made part of the record. These basically stated that claimant did not say she was injured, or appear to be injured, on (date of injury)nd, but that she had previously been complaining of leg pain from going up and down ladders. Some of the statements mentioned seeing claimant stocking water cans.

Two videotapes made by private investigators were introduced into evidence. One showed a woman washing a van at a car wash; in some of the film the quality was poor or the woman was in silhouette. The claimant said it could have been either her or her mother; she said she was unable to deny she washed her van on the day in question, but she did not remember washing it. Mr. GG testified that he had seen the video and it appeared to be claimant who was washing the van. The other film showed a woman, apparently claimant, stooping beside the open door of a truck before entering the truck and driving off.

The carrier contends the hearing officer erred in finding and concluding that the claimant suffered a cervical sprain as a result of tripping on a pallet in the course of performing her duties for employer on (date of injury), and that carrier is thus liable for benefits on this claim.

The claimant in a workers' compensation case has the burden of proving by a preponderance of the evidence that he or she sustained an injury in the course and scope of employment. Reed v.Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). In this case, the claimant testified that she tripped over a pallet and fell while at work, and that she felt pain which became more intense over time and required her to seek medical treatment. To the extent that her testimony was conflicting with regard to the time of the incident, the hearing officer may have found credible claimant's testimony that she was not wearing a watch and did not know what time it was. The hearing officer also may have been unpersuaded by the testimony of Ms. B and the coworkers' statements that they were unaware of any injury. This is in fact consistent with claimant's consistent testimony that she told no one of the incident while she was at work on (date of injury)nd. The hearing officer may also have found credible the reports of Dr. T, which give a history and diagnosis consistent with claimant's testimony.

The hearing officer is the sole judge of the relevance and materiality of the evidence, and of its weight and credibility. Article 8308-6.34(e). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). From our review of the record, we find the hearing officer's decision to be supported by sufficient evidence. Only if we were to determine, which we do not do in this case, that the determinations of the hearing officer were so against the great weight and

preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside her decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).
The decision of the hearing officer that claimant suffered a cervical sprain in the course and scope of her employment is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge